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131027—37——1

In the Supreme Court of the United States

OCTOBER TERM, 1936

No.—

FEDERAL TRADE COMMISSION, PETITIONER

v.

STANDARD EDUCATION SOCIETY ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit, entered in this cause on December 21, 1936, which modified in certain respects an order of the Federal Trade Commission requiring the respondents to cease and desist from certain alleged unfair methods of competition in interstate commerce.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 486) has not yet been reported.

JURISDICTION

The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U. S. C., Title 15, Sec. 45), and under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Are false representations to prospective purchasers of sets of books that they were to receive the books free and pay only for loose-leaf annual supplements so obviously false that they do not amount to an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act?

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, approved September 26, 1914, c. 311, 38 Stat. 717, 719 (U. S. C., Title 15, Sec. 45) is printed in the Appendix, *infra*, pp. 15–18.

STATEMENT

The respondents herein are Standard Education Society, a Minnesota corporation (R. 8); Standard Encyclopedia Corporation, an Illinois corporation (R. 27) and the following individuals: H. M. Stanford, president, director, general manager and a stockholder of Standard Education Society (R. 2, 12, 379, 382, 412, 429); W. H. Ward, vice president, director and a stockholder of Standard Edu-

cation Society (R. 30, 383, 424); and A. J. Greener, comptroller, auditor, director and a stockholder of Standard Education Society (R. 383, 412, 427, 467). The respondents Stanford, Ward and Greener are also the incorporators of Standard Encyclopedia Corporation (R. 424). The respondent corporations are engaged in the compilation and production of encyclopedias and a loose-leaf extension service in connection therewith and the sale thereof in interstate commerce throughout the United States (R. 8, 27). The respondent Standard Education Society is also engaged in the sale of a course of home study and instruction which it offers under the name of Standard Extension University (R. 5, 10, 24, 28, 199–201; 204–210).

On February 25, 1929, the Federal Trade Commission issued a complaint against Standard Education Society and the respondent H. M. Stanford, individually and as president thereof, alleging the use of unfair methods of competition in interstate commerce, in violation of Section 5 of the Federal Trade Commission Act, in connection with the sale of encyclopedias and a correspondence course of home study and instruction (R. 2–7). The said respondents answered (R. 8–11, 12–13) and a hearing was held before an examiner (R. 81–414).

Thereafter, on December 4, 1929, the Commission issued a supplemental complaint naming as respondents, Standard Education Society, Standard Encyclopedia Corporation, a corporation organ-

ized and existing under the laws of the State of Illinois, H. M. Stanford, W. H. Ward and A. J. Greener (R. 20–26). The supplemental complaint alleged that subsequent to the issuance of the original complaint the respondents Stanford, Ward and Greener had organized, under the laws of the State of Illinois, a corporation known as Standard Encyclopedia Corporation, that Standard Education Society had ceased publishing encyclopedias and reference works, and that this business had been taken over by Standard Encyclopedia Corporation which was engaged in compiling and publishing the encyclopedias and works formerly published by Standard Encyclopedia Corporation, and was selling and distributing them in interstate commerce. The supplemental complaint further alleged that Standard Encyclopedia Corporation and the individual respondents individually and as directors of Standard Encyclopedia Corporation were using substantially the same methods of unfair competition alleged in the original complaint to have been used by Standard Education Society.

On January 6, 1930 the respondents, Standard Encyclopedia Corporation, W. H. Ward and A. J. Greener answered the supplemental complaint (R. 27–31). Testimony and other evidence in support of charges in the supplemental complaint and in opposition thereto were presented by the parties before an examiner (R. 415–470). It was stipulated that

in determining the issues raised by the supplemental complaint and the answers thereto the Commission might consider the evidence introduced at the hearing on the original complaint (R. 34–35).

A final hearing was held before the Commission and on December 24, 1931 the Commission made and entered findings of fact and conclusion based thereon (R. 65–77).

The pertinent findings of the Commission may be summarized as follows:

Standard Education Society publishes and sells a work known as the Standard Reference Work and Standard Encyclopedia Corporation publishes and sells a work known as the New Standard Encyclopedia. Both of these works consist of ten volumes which are accompanied, when delivered to purchaser, by a loose-leaf binder. The corporate respondents also publish and sell a so-called extension service which consists of loose-leaf material for inclusion in the binder, this material being represented as designed to keep the encyclopedias up to date. The usual price for either the Standard Reference Work or the New Standard Encyclopedia and the extension service is $69.50. Sometimes sets of works of fiction are included and, in that event, the price is $89.00. (R. 69.) The respondents, through the mails and by their agents, represent to prospective purchasers that each of the prospective purchasers has been specially selected to receive free of cost a set of respondents' books and that the only return desired for the gift

is permission to use the name of the prospective purchaser for advertising purposes and as a reference. At the same time it is represented that the price of $69.50 is paid only for loose-leaf material which will be furnished the purchaser from time to time to keep the publications up to date and that the regular price of the books and loose-leaf service is $150, or sometimes as much as $200. These representations are false and misleading. The encyclopedias are not in fact given away. The price of $69.50 is in fact the regular price of the encyclopedia plus the loose-leaf service. The prospective purchasers have not been specially selected as recipients of a gift and the regular price of the books is not $150 or $200. (R. 69–73.)

Respondents also represent that certain persons have given testimonials in favor of Standard Reference Work and New Standard Encyclopedia when such is not the fact (R. 73–74). The respondents also include in their prospectus and in their publications a list of contributors which includes the names of persons who have not made contributions to the Standard Reference Work or the New Standard Encyclopedia (R. 74–75).

The respondents also sell a correspondence course of Home Study and Instruction, this branch of their business being carried on under the name of Standard Extension University. Respondents represent to prospective purchasers of this course of instruction that it is offered to them as a "special introductory enrollment" course and at a

price less than the usual price charged to the public generally. These representations are false, misleading and deceptive because the course is not offered to a certain number of persons at a special price, but is sold to everyone at the same price. (R. 75.)

The Commission also found that Standard Encyclopedia Corporation was organized by the individual respondents for the purpose of evading any order that might be issued by the Federal Trade Commission against the respondent Standard Education Society and that the individual respondents have used and are using the corporate respondents to carry on business in the manner described in the findings (R. 76).

On the basis of its findings and conclusions, the Commission issued a cease and desist order (R. 78–80), which directed the respondents and each of them to cease and desist from:

> (1) Advertising or representing in any manner to purchasers or prospective purchasers that any books or set of books offered for sale and sold by them will be given free of cost to said purchasers or prospective purchasers, when such is not the fact.
>
> (2) Advertising or representing in any manner that a certain number of sets or any set of books offered for sale or sold by them has been reserved to be given away free of cost to selected persons as a means of advertising, or for any other purpose, when such is not the fact.

(3) Advertising or representing in any manner that purchasers or prospective purchasers of respondents' publications are only buying or paying for loose-leaf supplements intended to keep the set of books up-to-date for a period of ten years, when such is not the fact.

(4) Advertising or representing in any manner that respondents' publication is a recently completed, new, and up-to-date encyclopedia, when such is not the fact.

(5) Selling or offering for sale any set of books of the same text and content material under more than one name or title.

(6) Advertising or representing in any manner that the usual price at which respondents' publications are sold is higher than the price at which they are offered in such advertisements or representations, when such is not the fact.

(7) Advertising or representing any person as a contributor to or editor of any set of books or publications who has not performed services in making or preparing contributions to or who has not performed services in the editing of such books or publication and consented that he may be held out to the public as a contributor or as an editor or assistant editor.

(8) Advertising or representing that any person has given testimonials or recommendations for and concerning respondent's publications, when such is not the fact.

(9) Publishing or causing to be published and circulated testimonials or recommenda-

tions of and concerning respondents' publications alleged to have been made by any person when such testimonials or recommendations have not been made by such person.

The tenth clause of the order directed the respondents Standard Education Society, H. M. Stanford, W. H. Ward, and A. J. Greener, in connection with the offering for sale of any home study course, to cease and desist from:

> (1) Advertising or representing in any manner to purchasers or prospective purchasers that the course of instruction is offered for sale and sold to the purchasers or prospective purchasers as a "Special Introductory Enrollment", and at a specially reduced price, when such is not the fact.

On January 20, 1936 the Federal Trade Commission filed in the Circuit Court of Appeals for the Second Circuit, pursuant to the provisions of Section 5 of the Federal Trade Commission Act, an application for the enforcement of the cease and desist order (R. II). The respondents filed an answer denying violation of the cease and desist order, and praying that the application for its enforcement be dismissed and that the order be vacated and set aside. The cause came on for argument on November 12, 1936, and on December 14, 1936 the Circuit Court of Appeals rendered an opinion holding that the cease and desist order should be modified in certain respects and otherwise affirmed, and that after the order had been

amended in accordance with the court's opinion it should be remitted to the Commission as Special Master to hear and report whether respondents had complied with the provisions of the order which were affirmed (R. 486). An order in accordance with this opinion was entered by the Circuit Court of Appeals on December 21, 1936 (R. 493).

The order of the Circuit Court of Appeals modified the cease and desist order of the Commission in the following respects:

1. By striking from the order the first, third and eighth clauses set forth on pages 7, 8, *supra.*

2. By striking all of the tenth clause, set forth on page 9, *supra,* except those provisions which relate to representations regarding the price of the course of instruction.

3. By modifying the provisions of the seventh clause, set forth on page 8, *supra,* so as to exclude from its terms contributors to "Aiton's Encyclopedia."[1]

4. By reversing the order so far as it included the respondent Stanford in the tenth clause, respondent Ward in the seventh, ninth and tenth clauses, and altogether so far as it related to respondent Greener.

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[1] Aiton's Encyclopedia was the predecessor of the encyclopedias which respondents now produce and sell. It was first published in 1910 (R. 379–380). The Commission found that Aiton's Encyclopedia was different in form, in material and in purpose from the present encyclopedias sold by respondents (R. 73) and this finding was fully supported by the record (R. 388–404).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that respondents' false and misleading representations that the sets of books offered for sale by them were given free of cost and that the purchasers paid only for loose-leaf supplements intended to keep the books up-to-date did not constitute an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act.

2. In striking from the cease and desist order the provisions prohibiting respondents from advertising or representing that any person had given testimonials or recommendations for their publications when such was not the fact.

3. In modifying the cease and desist order so as to exclude from the provisions of the seventh clause of the said order persons who had contributed to Aiton's Encyclopedia.

4. In striking from the tenth clause of the cease and desist order all representations except those regarding price.

5. In holding that the cease and desist order should be altogether reversed as to the respondent Greener, reversed to the extent that it included Stanford in the tenth clause, and reversed to the extent that it included respondent Ward in the seventh, ninth and tenth clauses.

6. In failing to hold that when a petition for enforcement of a cease and desist order is brought, pursuant to the provisions of Section 5 of the Fed-

eral Trade Commission Act, the court should determine the issue of compliance before reviewing the validity of the cease and desist order.

7. In failing to hold that by praying in their answer that the order to cease and desist be vacated the respondents waived their right to insist that noncompliance with the order be proved as a condition precedent to the granting of the application of the Federal Trade Commission for enforcement of the cease and desist order.

8. In remitting the proceeding to the Commission as Special Master to hear and report as to whether respondents had complied with the provisions of the cease and desist order which were affirmed.

9. In failing to enter a decree affirming the cease and desist order and commanding the respondents and each of them to comply therewith.

10. In modifying the cease and desist order of the Federal Trade Commission.

ARGUMENT

1. The court below has decided that respondents' false representations that they were giving away sets of books free of cost and charging only for the loose-leaf supplements intended to keep the books up to date did not constitute an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act because no one would "be fatuous enough to be misled" by such misrepresentations. This principle is in direct conflict with the decision of the Circuit Court of Ap-

peals for the Seventh Circuit in *Consolidated Book Publishers, Inc.* v. *Federal Trade Commission,* 53 F. (2d) 942, certiorari denied, 286 U. S. 553, in which, under similar facts, a cease and desist order almost identical with the one here in question was affirmed. The court below recognized the existence of the conflict (R. 489), but stated that it preferred to follow *John C. Winston Co.* v. *Federal Trade Commission,* 3 F. (2d) 961 (C. C. A. 3d), which is in accord with the instant case.[2]

2. The court below did not purport to find that in fact no one had been misled by the false statements with respect to the gift of the set of books, and, indeed, could not have so found in view of the proof in this case that many persons had in fact been deceived (R. 82–84, 86–88, 90–92, 94–95, 104–105, 110–115, 119, 122–123, 125–127, 153, 284–285, 287, 288–289, 311–312, 315–317, 320, 338–340, 343, 365, 370, 407). The facts thus being clear, the decision below appears to rest upon the broad legal principle that if misrepresentations are so obviously false that the court believes a man would be fatuous to believe them, they do not amount to an unfair method of competition within the meaning of Section 5. Stated otherwise, the rule applied by

[2] The court below suggested that the *Consolidated Book Publishers* case might be distinguished on the ground that "the case was complicated by a number of graver practices which probably colored the whole." (R. 489.) Even if that distinction be of legal force, it is inapplicable, for similar "graver practices" are present in the case at bar (R. 122–123, 153, 288–289, 311–312, 315–317, 365, 370, 407).

the court below appears to be that false representations do not constitute unfair competition unless in the court's judgment they are of a character likely to deceive a man of ordinary prudence. If this rule be accepted, it will unduly restrict the scope of Section 5, and the jurisdiction of the Commission thereunder. The principle has never been approved by this Court, and its assertion by the lower court raises a legal question of general application and great legal importance which should be determined by this Court.

3. The Commission now has pending nine proceedings relating to unfair competitive practices in the sale of books and publications in interstate commerce which are substantially similar to the practices in the case at bar. In view of the direct conflict noted, *supra,* pp. 12–13, the Commission is uncertain as to the proper rule to be applied in these proceedings. This uncertainty can be removed only by a decision of this Court.

4. The decision of the court below is also incorrect in several other respects, as to which error has already been specified, pages 11–12, *supra,* but as to which it does not seem necessary to make a full argument now.

CONCLUSION

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

MARCH, 1937.

APPENDIX

Section 5 of the Federal Trade Commission Act (Act of September 26, 1914, c. 311, 38 Stat. 717, 719, U. S. C., Title 15, Sec. 45) is as follows:

That unfair methods of competition in commerce are hereby declared unlawful.

Power to prohibit.—The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Procedure by commission.—Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person,

partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

Enforcement of orders.—If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript

the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Application to set aside order.—Any party required by such order of the commission to cease and desist from using such

method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

Jurisdiction of court.—The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

* * * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1937